GURBACHAN SINGH & ORS *a*

v.

T/N MUTHU & LEE & ANOR

HIGH COURT MALAYA, IPOH *b*
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-390-89]
17 JANUARY 2001

CIVIL PROCEDURE: *Pleadings - Amendment - Statement of claim - Delay - Delay of three years - Whether inordinate - Whether application to amend bona fide - Addition of new course of action - Whether had changed the entire character of suit - Whether prejudicial - Rules of the High Court 1980, O. 20 r. 5* *c*

The plaintiffs sought to purchase two shop houses ('the property') from the first defendant, the option holder of the property. In the negotiation that followed, the plaintiffs orally agreed to exercise the option and purchase the property. The plaintiffs' undertaking notwithstanding, the first defendant sold the property to one Lau Wing Hong ('Lau'). The plaintiffs sued the first defendant for fraud, deceit and misrepresentation, and thereafter filed an action for specific performance against both the first defendant and the second defendant, the proprietor of the property. These apart, the plaintiffs also applied for and obtained an ex-parte injunction on 29 November 1989 barring the sale of the property to Lau. *d* *e*

Subsequently, in an action for declaratory relief by the second defendant, the Federal Court held on appeal that there was a concluded agreement between Lau and the second defendant, that the injunction had no effect on the said agreement, and further that there was no impediment for the second defendant to dissolve the injunction. The second defendant in the circumstances applied to dissolve the injunction, and on 27 June 1997, Chin Fook Yen JC, presented with the *fait accompli*, dissolved the injunction and granted specific performance of the sale and purchase agreement in favour of Lau. *f* *g*

Thereafter, the plaintiffs amended their statement of claim against the first defendant and *inter alia* abandoned their claim for specific performance. Then, on 19 July 2000, the plaintiffs again applied to amend their re-amended statement of claim. The re-re amendment in effect sought to hold the first defendant responsible for damages that might be awarded against the plaintiffs as a consequence of the dissolution of the injunction on 27 June 1997. The learned registrar allowed the application to amend *h* *i*

whereupon the first defendant appealed. Before the learned Judicial Commissioner, the main issues that arose were: (i) whether the application to amend was done too late in the day; and (ii) whether it had changed the entire character of the suit and was therefore prejudicial to the first defendant.

Held:

[1] The provisions relating to amendments of the writ and pleadings are governed by O. 20 r. 5 Rules of the High Court 1980. The general principle is that the court will allow such amendments as will cause no injustice to the other parties provided the application was *bona fide*, that prejudice caused to the other side can be compensated by costs and the amendments will not in effect turn the suit from one character into a suit of another and inconsistent character. Also, a new course of action, if allowed to be introduced, must concern the same parties, involve substantially the same facts and arise out of the same transaction.

[2] Chin Fook Yen JC ordered specific performance in favour of Lau on 8 April 1997 and dissolved the injunction on 27 June 1997. His Lordship had also ordered damages to be assessed in both instances. In the circumstances, if the plaintiffs were truly concerned with the issue of indemnity against the first defendant, the plaintiffs ought to have moved the court almost immediately to amend their pleadings in this respect. Whilst the plaintiffs had amended their pleadings on 19 May 1999 abandoning their prayer for specific performance and claiming only for damages, they had not made any effort then to introduce the purported claim for indemnity against the first defendant in respect of this suit.

[3] The dissolution of the injunction which is the subject matter of the amendment was done some three years ago. The delay is clearly inexplicable and has cast a serious doubt on the *bona fide* of the plaintiffs in seeking the amendment. The amendment sought by the plaintiffs is indeed a belated manoeuvre designed to extricate themselves from the predicament they have found themselves in as a result of the dissolution of the injunction and the removal of the caveat.

[4] The injunction of 29 November 1989 was obtained upon the usual undertaking as to damages in the event that the court would subsequently set aside the injunction. That being so, to impute any damages which would have been awarded against the plaintiffs as a result of the dissolution of the injunction to the first defendant would

go against the basic tenets of injunction as well as the court order of 30 November 1989. It is also a veiled attempt to introduce a new cause of action which does not substantially arise out of the same set of facts.

[5] The re-re amendment, if allowed, would result in prejudice to the first defendant which cannot be compensated with costs as their entire stance of defence would have to be altered dramatically as a consequence.

[Appeal allowed.]

Case(s) referred to:

Abdul Johari Abdul Rahman v. Lim Hon Chong & Ors [1997] 1 CLJ 371 ***(refd)***
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 ***(refd)***
Hock Hua Bank Bhd v. Leong Yen Chin [1987] 1 MLJ 230 ***(refd)***
Kettleman & Ors v. Hansel Properties Ltd [1988] 1 All ER 38 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd [2000] 3 AMR 2821 ***(refd)***
Multi Pack Singapore Pte Ltd (in receivership) v. Intraco Ltd & Ors [1992] 2 SLR 793 ***(refd)***
Palaniappan v. Universiti Pertanian Malaysia [1995] 1 CLJ 693 ***(refd)***
Raphael Putra v. Insas Berhad & Anor [2000] 4 AMR 4483 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***
Simtech (M) Sdn Bhd v. Yeoh Cheng Lian Construction Sdn Bhd [1992] 1 MLJ 11 ***(refd)***
Taisho Co Sdn Bhd v. Pan Global Equities Bhd [1999] 1 CLJ 703 ***(refd)***
Wright Norman & Anor v. OCBC Ltd [1994] 1 SLR 513 ***(refd)***
Yamaha Motors Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5

For the plaintiffs - K Mohan
For the 1st defendant - Chee Weng Weng
For the 2nd defendant - James Devadason

Reported by WA Sharif

JUDGMENT

Su Geok Yiam JC:

Enclosure 197 is an appeal by the 1st defendant's counsel against the decision of the learned registrar in allowing the plaintiffs to amend their statement of claim *vide* encl. 177 on 19 July 2000.

In order to appreciate the basis of this application, the objections to it and my consequent decision, one needs to go back to the historical background of the case.

The salient aspects of the plaintiffs' claim which can be garnered from the statement of claim are as follows. The plaintiffs were joint purchasers of shop houses, No. 37 and 39, Station Road, Ipoh (hereinafter referred to as "the said shop houses"). The 1st defendant was a firm of real estate brokers, whilst the 2nd defendant, a private limited company, was the registered proprietor of the said shop houses. By a letter dated on or about 2 November 1989, the one defendant had obtained an option from the 2nd defendant's solicitors in regard to both the said shop houses.

The said option was for a sum of RM450,000 being the purchase price for both the said shop houses and the option had to be exercised by payment of 10% of the purchase price of RM450,000. The 1st plaintiff had expressed his desire to one Miss Juliana Devadason, a partner in the firm of the 2nd defendant's solicitors to purchase the said shop houses and was informed that the price would not be any lower then RM450,000 and that the option given to the 1st defendant was to be exercised by 12 noon on 28 November 1989.

After viewing the said property, the 1st plaintiff, one Mr. Hira Singh, Mr. William John and Mr. Morganasundram, respectively, and Mr. Lee Heng, a partner of the 1st defendant, met at a coffee house, wherein after some discussion Mr. Lee Heng had reiterated that the option had to be exercised by the plaintiffs by 12 noon on 28 November 1989. The plaintiffs categorically then informed Mr. Lee Heng and Mr. Hira Singh that "he will take it". At the said coffee house Mr. Hira Singh had informed the plaintiff that the 1st defendant had obtained the option from the 2nd defendant, but he was in turn helping the plaintiffs.

The 1st plaintiff averred that a firmly concluded contract came into existence when he agreed conclusively at that material time to purchase the said shop houses and that the deposit of 10% was to be paid by 28 November 1989.

On 27 November 1989, the 1st plaintiff had apparently telephoned and reconfirmed with Mr. Hira Singh that he together with the 2nd and 3rd plaintiffs would purchase the said shop houses and the deposit would be paid by the morning of 28 November 1989.

On the morning of 28 November 1989, the plaintiffs met Mr. Lee Heng, at 9.20am and offered to issue a cheque in respect of the deposit but was told that the solicitors of the 2nd defendant had wanted payment by bank draft and not by cheque. The 1st plaintiff then said he would make the necessary arrangements and Mr. Lee Heng had agreed to this.

The 1st plaintiff then went to the law office of the 2nd defendant whereupon he met with Mr. Y.S. Lee, the solicitor handling the matter, who informed him that the solicitors would only receive the payment of the deposit through the 1st defendant. The plaintiffs had offered to pay the deposit by way of a bank draft and a cheque and this was allegedly agreed upon by the said solicitor.

Arrangements were made by the 1st plaintiff immediately and at 11.11am on 28 November 1989 he went to the office of the 1st defendant to lodge his payment but was told by a partner of the 1st defendant's firm, one Mr. Muthu, that Mr. Lee Heng had just taken a purchaser to the office of the 2nd defendant's solicitors to make payment towards the purchase of the said shop houses. The plaintiffs then went to the law office of the 2nd defendant and discovered that the new purchaser, one Mr. Lau, had since deposited his monies, and was apparently unaware of the plaintiffs' desire to purchase the said shop houses.

In the main, the plaintiffs' claim against the 1st defendant is for fraud, deceit and misrepresentation as particularised in prayers 39 and 40 of the amended statement of claim.

This in a nutshell is a brief summary of the plaintiffs' claim.

On 29 November 1989, the plaintiffs filed a writ action against the 1st and 2nd defendant for specific performance of the said oral agreement and simultaneously applied for an *ex parte* injunction on 29 November 1989, from Abdul Malek J (as His Lordship then was). The order of 29 November 1989 which the plaintiffs obtained merits reproduction as follows:

Between

1. GURBACHAN SINGH
2. KARTAR SINGH
3. TEJA SINGH ... Plaintiffs

And

1. TETUAN MUTHU & LEE
2. TETUAN CHARLES GRENIER SDN BHD... Defendants

BEFORE THE HONOURABLE MR. JUSTICE
TUAN HAJI ABDUL MALEK BIN HAJI AHMAD
THIS 30TH DAY OF NOVEMBER, 1989
...

IT IS ORDERED that the Second Defendants and or their agents, servants or solicitors be and are hereby restrained from crediting any deposit from anyone except the plaintiffs in respect of the sale of the shophouses No. 37, and 39, Station Road, Ipoh until the disposal of this suit or further order of this Honourable Court.

AND IT IS ORDERED that the Second Defendants be and are hereby restrained from entering into any agreement or performing the said sale and purchase of shophouses situated at No. 37 and 39, Station Road Ipoh with anyone except the Plaintiffs until the disposal of this suit or further order of this Honourable Court.

AND IT IS ALSO ORDERED that the Second Defendants be and are hereby restrained from receiving any further deposit or part payment towards the purchase price of the said shop houses from Mr. Lau (the purported purchaser) or anyone also until the disposal of this suit or further order of this Honourable Court.

AND IT IS ALSO FURTHER ORDERED that the Second Defendants be and are hereby restrained from delivering possession of the shophouses No. 37 and 39 Station Road, Ipoh to anyone until the disposal of this suit or further order of this Honourable Court.

The other purported purchaser of the said shop houses, one Lau Wing Hong, had himself embarked on another writ action, *vide* Civil Suit 22-40-89, enforcing his rights to the said property by way of specific performance.

Simultaneously, the 2nd defendant had by way of an Originating Summons No. 24-1016-92, sought a declaration that if there was an agreement between themselves and Lau Wing Hong, that agreement was frustrated by the injunction obtained by the present plaintiff on 29 November 1989. The learned judge, Ong See Seng, J dismissed the said application of the 2nd

defendant and on appeal to the Federal Court, it was held, *inter alia*, that there was a concluded agreement between the said Lau Wing Hong and the 2nd defendant, and further that as the injunction obtained by the plaintiffs on 29 November 1989 came into effect after the contract between the 2nd defendant and the said Lau Wing Hong it had no effect upon the transaction that had already been concluded. The court further held that there was material on record that reasonably supported the inference that the said Lau Wing Hong was really an innocent purchaser who had entered into a contract with the 2nd defendant without any notice whatsoever of the alleged transaction on which the injunction was obtained. The Federal Court held, in the circumstances, there was no impediment to an application by the 2nd defendant to have the injunction dissolved so that the sale and purchase agreement between the 2nd defendant and the said Lau Wing Hong could be proceeded upon. The full text of this judgment is found in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625.

Armed with this judgment in hand *Charles Grenier Sdn Bhd* naturally applied to dissolve the said injunction obtained by the present plaintiffs. Presented with this *fait accompli* from the Federal Court in *Charles Grenier Sdn Bhd (supra)* Chin Fook Yen, JC (as His Lordship then was) granted the dissolution of the said injunction on 27 June 1997. The said order which is found in encl. 101 is reproduced below as follows:

DALAM MAHKAMAH TINGGI MALAYA Dl IPOH
GUAMAN SIVIL 22-390-89

ANTARA

1. GURBACHAN SINGH
2. KARTAR SINGH
3. TEJA SINGH
   Semua d/a Tetuan Bachan & Kartar
   Peguambela dan Peguamcara
   Tingkat Satu
   31 Station Road, Ipoh. ... PLAINTIF-PLAINTIF

DAN

1. TETUAN MUTHU & LEE
   (didakwa sebagai firma)
   Tingkat 1,
   No. 4, Station Road, Ipoh.
2. TETUAN CHARLES GRENIER SDN BHD
   d/a Tetuan Maxwell Kenion Cowdy & Jones
   Peguambela dan Peguamcara
   No. 31, Jalan Bandar Raya
   Ipoh ... DEFENDAN-DEFENDAN

DI HADAPAN Y.A. TUAN CHIN FOOK YEN
HAKIM MAHKAMAH TINGGI IPOH
PADA 27HB JUN 1997

PERINTAH

ATAS PERMOHONAN pihak Defendan Kedua melalui Saman Dalam Kamar (Lampiran 68) bertarikh 6 haribulan Disember 1996 ...

ADALAH DIPERINTAHKAN bahawa:

1. Injuksi bertarikh 30.11.89 diketepikan.
2. Tarikh untuk penaksiran gantirugi ditetapkan oleh Mahkamah Yang Mulia ini di hadapan Penolong Kanan Pendaftar.
3. Kos adalah kos dalam kausa.

Bertarikh pada 27 haribulan Jun 1997.

His Lordship then proceeded to hear Civil Suit 22-40-93 whereupon he granted specific performance of the said agreement in favour of the said Lau Wing Hong. The said order also deserves reproduction as follows:

TINDAKAN INI telah dibicarakan di Mahkamah Terbuka pada 8hb. April 1997 dengan kehadiran Asbir Kaur Sangha dan Encik Hira Singh peguam bagi pihak Plaintif dan Encik Paul Subramiam dan Encik James Devadasan peguam bagi pihak Defendan.

ADALAH DIHAKIMKAN bahawa tuntutan Plaintif untuk Pelaksanaan Spesifik untuk Perjanjian bertarikh 28hb November 1989 yang dimasukkan di antara Plaintif dan Defendan dengan ini dibenarkan dengan kos.

DAN ADALAH DIHAKIMKAN BAHAWA Defendan hendaklah membayar gantirugi kepada Plaintif yang akan ditaksirkan oleh Timbalan Pendaftar, Mahkamah Tinggi, Ipoh.

In respect of the private caveat, reference No. 5365/97, Volume 1204 Folio 35, entered by the 1st plaintiff on 4 July 1997 against the 2 lots of land on which the said shop houses were situated, the registrar of titles had on 14 October 1997 issued to the 1st plaintiff a notice of intended removal of the caveat, Form 19C, pursuant to s. 326 of the National Land Code 1956 at the instance of the said Lau Wing Hong. On 10 March 1998, the 1st plaintiff applied to the court *vide* summons-in-chambers (*ex parte*) at encl. 111 for the private caveat to be extended until the outcome of this civil suit.

However, on 18 April 1998, Suleiman Hashim, J dismissed the 1st plaintiff's application with costs. In his written grounds of judgment which appear in the file, His Lordship, after referring at length to the decision of the Federal Court in *Charles Grenier (supra)* was of the view that "with respect also what appears to be a non-sequitur is that first plaintiff should have entered the caveat on 4 July 1997, after the Federal Court judgment in *Charles Grenier* on 20 September 1996 had found Mr. Lau Wing Hong "an innocent party", after the Federal Court judgment in *Charles Grenier* on 20 September 1996 had found "no impediment" for the dissolution of the injunction obtained by plaintiffs on 30 November 1989." *(sic)*

Against this historical backdrop I now come to the issue at hand. In their application to **re-re amend** their statement of claim it was the contention of the plaintiffs that in view of the decision of the Federal Court in *Charles Grenier Sdn Bhd (supra)* and subsequently the decision of Chin Fook Yen, JC (as His Lordship then was) in Civil Suit 22-40-89, the cause of action of the plaintiffs for specific performance of the said agreement of 24 November 1989, and on 28 November 1989, is a non starter, and as such the plaintiffs are claiming purely for damages against the 1st defendant. Thus the **re-re amendment** is to reflect the changes brought about by these intervening events, and it would thus be imperative that the amendment be allowed to reflect the said changes. There was no new relief sought but only one for damages. The case of *Labasama Group (M) Sdn Bhd v. Insofex Sdn Bhd* [2000] 3 AMR 2821 was cited in support. In my opinion what the plaintiffs' counsel has failed to appreciate is that an amendment had already been granted on 19 May 1997 to reflect their claim purely for damages.

It was also the contention of the plaintiffs that by the dissolution of the injunction, by Chin Fook Yen, JC (as His Lordship then was) on 27 June 1997, His Lordship had ordered that damages be assessed. The plaintiff had appealed against this decision. The plaintiff in Civil Suit 22-40-93, had also obtained damages which was set aside on appeal by the Court of Appeal, though this decision of the Court Of Appeal is presently being appealed upon. It was the argument of the plaintiffs' counsel, that para. 44 sub(3) of the purported amendment was done purely as a precautionary measure in the event the decision of the Court of Appeal was reversed. Paragraph 44 sub(3) of the purported amendment reads as follows:

> That the 1st defendant indemnify the plaintiffs for all damages and costs ordered to be paid by the Plaintiffs to the 2nd Defendants and Mr. Lau Wing Hong arising from the setting aside of the injunction dated 30.11.1989 on 27.6.1997 and the appeals therefrom and damages and costs ordered in setting aside the private caveats entered by the 1st and 2nd Plaintiffs.

The crux of the plaintiffs' submissions was that the proposed **re-re amendment** was a sheer necessity in view of the fact that the injunction they obtained on 30 November 1989 was eventually dissolved on 27 June 1997. The first defendant in the present suit was entirely responsible for the plaintiffs' course of conduct then, and as such any damages ordered against the plaintiffs presently as a result of the dissolution of the injunction in the present suit, and its resulting effect in Civil Suit 22-40-93 should be indemnified by the 1st defendant. There was according to the respondents' counsel no prejudice or delay in this matter.

In resisting the application, it was the principal submission of the appellant's counsel, Mr. Chee Weng Weng, that the application to amend was done late in the day and was prejudicial in nature to the 1st defendant, as it had the effect of changing the entire character of the suit. By this amendment, the plaintiffs were changing their front, and introducing a new cause of action, more in particular, on the issue of indemnity, and as such the second amendment if granted, will put the 1st defendant in a position where an order for costs would not be sufficient compensation.

A plethora of cases on amendments were cited by both counsels *vis a viz, Simtech (M) Sdn Bhd v. Yeoh Cheng Lian Construction Sdn Bhd* [1992] 1 CLJ 509, *Multi Pack Singapore Pte Ltd (in receivership) v. Intraco Ltd & Ors* [1992] 2 SLR 793, *Yamaha Motors Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191, *Hock Hua Bank Bhd v. Leong Yen Chin* [1987] 1 MLJ 230, *Wright Norman & Anor v. OCBC Ltd* [1994] 1 SLR 513, *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 CLJ 693 and *Abdul Johari Abdul Rahman v. Lim Hon Chong & Ors* [1997] 1 CLJ 371.

In the appeal before me the learned deputy registrar had allowed the respondents' application to **re-re amend** their statement of claim. In line with the rationale in *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716, since it is an appeal from the deputy registrar to a judge in chambers, it becomes a rehearing. Further since it is an appeal from a discretionary order of the deputy registrar, the judge should exercise his own discretion as though the matter was before him for the first time, unfettered by the previous exercise of discretion by the deputy registrar. (see *Abdul Johari Abdul Rahman v. Lim Hon Chong & Ors* [1997] 1 CLJ 371).

I am cognisant of the fact that the general principle is that the court will allow such amendments as will cause no injustice to the other parties provided the application was *bona fide*, that prejudice caused to the other side can be compensated by costs and the amendments will not in effect turn the suit from one character into a suit of another and inconsistent

character. In allowing a new cause of action to be introduced it must be concerned with the same parties and which involved substantially the same facts and arose out of the same transaction.

The provisions relating to amendments of the writ and pleadings are governed by O. 20 r. 5, Rules of the High Court 1980. It is trite law that amendments can be made at any stage of the proceedings including during the trial. The Federal Court, the apex court of this country, had occasion to consider and interpret O. 20 r. 5 in the case of *Yahama Motor Co. Ltd (supra)*.

The Court of Appeal had similarly considered O. 20 r. 5 in *Taisho Co Sdn Bhd v. Pan Global Equities Bhd* [1999] 1 CLJ 703 and *Raphael Putra v. Insas Berhad & Anor* [2000] 4 AMR 4483.

What can be culled from these authorities is that it is for the applicant who is asking the court to exercise a discretionary power in his favour to place material and advance some cogent reason to impel the court to lean on his side (see *Multi Pack Singapore Pte Ltd (1n Receivership) v. Intraco Ltd & Ors* [1993] 2 SLR 793).

On the issue of delay there is a paucity of reasons as to why the plaintiff had taken approximately three years to make this amendment. As mentioned earlier on, Chin Fook Yen, JC (as His Lordship then was) had dissolved the injunction on 27 June 1997, and further ordered specific performance in favour of Lau Wing Hong in Civil Suit 22-40-93 on 8 April 1997. His Lordship also ordered damages to be assessed by the learned registrar in both instances. If the plaintiff had their wits about them on the issue of the purported indemnity against the 1st defendant for all damages ordered by the plaintiff then they should have moved the court almost immediately to amend their pleadings in this respect. In fact the plaintiffs had amended their pleadings on 19 May 1999, abandoning their prayer for specific performance and instead claiming only for damages, but had still not made any effort then to introduce this purported claim for indemnity against the defendant in respect of this suit.

Counsel for the applicant made strenuous submissions that this court should not concern itself with the question of delay because an amendment may be made at any stage of the proceedings. This contention overlooks one important factor, that is, after the pleadings are deemed closed an amendment can only be made with the leave of court. Therefore, it becomes a matter which lies within the discretion of the court and when a party requires discretion to be exercised in its favour, delay is always a

relevant consideration in the granting or withholding of it because a court will only assist the vigilant and not the indolent (see *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396).

The pleadings have long closed and the dissolution of the injunction which is the subject of this amendment was done some three years ago. The delay of the plaintiff is inexplicable and must to my mind be a factor to be given some weight when considering the overall question of whether or not the **re-re amendment** should be allowed. I find that the consequences of the delay in making the application to amend should rest with the plaintiffs' lawyers because the reasons for the delay are wholly unsatisfactory. In addition, the three year delay also casts serious doubts on the *bona fides* of the plaintiffs in only seeking the amendment now because in all probabilities it will cause the hearing of the suit to be further postponed, thus, causing further delay. In this connection, it is pertinent to refer to the following passage in the judgment of Lord Griffith in the case of *Kettleman & Ors v. Hansel Properties Ltd* [1988] 1 All ER 38:

> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

The ostensible reason for the amendment as stated in the affidavit sworn by Gurbachan Singh Bagawan Singh, the 1st plaintiff, was that the amendment is sought to bring the true facts to the forefront of this Honourable Court. At the cost of repetition, the amsendment sought is to hold the 1st defendant/appellant responsible for any damages awarded against the plaintiffs as a consequence of the dissolution of the injunction on 27 June 1997 in respect of this suit and Civil Suit 22-40-89 and the removal of the caveat entered against the land. To me, the fact that the plaintiffs only seek to amend now indicates that this amendment is a belated manoeuvre designed to extricate themselves from the predicament they have found themselves in as a result of the dissolution of the injunction and the removal of the caveat.

It is to be noted that when obtaining the injunction on 29 November 1989, the plaintiffs had done so on the usual undertaking as to damages in the event that the court is of the opinion subsequently, that the injunction should be set aside, thereby causing the defendants to sustain loss or damage by reason of the granting of the injunction. In respect of Civil Suit 22-40-89, it is also pertinent to note that the 1st defendant was not made a party to that suit. To now by a complete volte-face impute any damages which have been awarded against the plaintiffs as a result of the dissolution of the injunction, to the 1st defendant, would go against the grain of the court order of 30 November 1989, and is a veiled attempt to introduce a new cause of action, which does not substantially arise out of the same set of facts.

In my view, the shifting of the issue of damages on the dissolution of the injunction onto the 1st defendant by the plaintiffs presently goes against the basic tenet of injunctions which is that an injunction is granted on the undertaking of damages by the applicant, so that in the event the injunction is dissolved the person wrongly enjoined will have recourse against the applicant. The ability of an applicant to honour his undertaking as to damages is a material factor to be considered by the court on a balance of convenience, when granting an injunction. (see *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504.

I am therefore of the view that if allowed, the **re-re amendment** would result in prejudice to the 1st defendant which cannot be compensated with costs as their stance of defence would have to be altered dramatically as a consequence.

For the aforesaid reasons I allowed the 1st defendant's appeal with costs.